No. 95-489

(10)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, *et al.*,
Petitioners,
v.
FEDERAL ELECTION COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICI CURIAE ON BEHALF OF DEMOCRATIC NATIONAL COMMITTEE, DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE AND DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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INTEREST OF AMICI

The Democratic National Committee ("DNC") is the national political organization of the Democratic Party, and is the "national committee" of the Democratic Party within the meaning of the Federal Election Campaign Act of 1971, as amended ("FECA" or the "Act"). 2 U.S.C. §431(14). The DNC is thus directly subject to the limitations imposed by the provision of FECA at issue in this case, 2 U.S.C. § 441a(d), with respect to expenditures

"in connection with the general election campaign[s]" of the Democratic Party's nominees for President of the United States and for the United States Senate and United States House of Representatives.

The Democratic Congressional Campaign Committee ("DCCC") is the political organization for Democratic Members of the House of Representatives and is defined by Federal Election Commission ("FEC") regulations, 11 C.F.R. § 110.1(c)(2), as one of the "political committees established and maintained by a national political party" within the meaning of FECA, 2 U.S.C. § 441a(a)(1)(B). The DCCC is responsible for assisting Democratic candidates running for election to the House. By virtue of delegations of expenditure authority by the national and state Democratic Party committees, the DCCC is directly subject to limitations imposed by section 441a(d) with respect to any expenditures it wishes to make "in connection with the general election campaign[s]" of Democratic candidates for the United States House of Representatives.

The Democratic Senatorial Campaign Committee ("DSCC") is the political organization for Democratic Members of the United States Senate and is also defined by FEC regulations, 11 C.F.R. § 110.1(c)(2), as one of the "political committees established and maintained by a national political party" within the meaning of FECA, 2 U.S.C. § 441a(a)(1)(B). The DSCC is responsible for assisting Democratic candidates running for election to the Senate. By virtue of delegations of expenditure authority by the national and state Democratic Party committees, the DSCC is directly subject to limitations imposed by section 441a(d) with respect to any expenditures it wishes to make "in connection with the general election campaign[s]" of Democratic candidates for the United States Senate.

Amici have a vital interest in the questions of whether section 441a(d) is constitutional and, if it is constitutional, in the standards that will be used by the FEC to determine when the limits imposed by that section apply to expenditures by party committees. Resolution of these questions will directly affect the amount of money *amici* can spend on their basic functions, including generating support for the Democratic Party and its principles, registering and turning out Democratic voters, and supporting particular candidates who are the nominees of the Democratic Party for federal office.

Pursuant to Sup. Ct. R. 37, written consent of all of the parties to the filing of this brief has been lodged with the Clerk.

STATEMENT OF THE CASE

Amici adopt the statement of the case in the brief of the petitioners.

SUMMARY OF ARGUMENT

1. The FEC's construction of section 441a(d) of the Act is unconstitutionally vague. The FEC's construction of section 441a(d) as applying to all communications that contain an "electioneering message" leaves parties without any meaningful guidance as to what the law requires. Therefore, such a construction violates the guarantee of due process that is contained in the Fifth Amendment to the United States Constitution.

2. In order to avoid this constitutional infirmity, the court of appeals should have construed section 441a(d) to apply to political party communications only when they expressly advocate the election or defeat of a clearly identified candidate. This Court, in *Buckley v. Valeo*, 424 U.S. 1 (1976), held that a limit on independent expenditures of individuals and groups must be so construed because it might otherwise be so vague and overbroad as to chill constitutionally protected expression not sufficiently related to the purpose of the statute.

Political parties undertake a wide range of communications, many of which, such as promoting policies and advancing positions on legislation, are akin to the sort of expenditures that this Court in *Buckley* held are entitled to a high degree of constitutional protection. The court of appeals proceeded on the premise that all such communications can nevertheless be treated as mere contributions to candidates, thereby implicating the statutory purpose of preventing real or apparent undue influence, by contributors to parties, on candidates who become officeholders. That premise was based on the FEC's presumption that parties cannot engage in truly "independent" expenditures because of the party's close relationship with its own candidates.

It is true that parties have a unique right and need to coordinate with their candidates, including party leaders and officeholders. Notwithstanding such coordination, many party communications do not implicate the relevant statutory purpose because they promote the party's ideas, positions or legislation, or urge support for the party generally, in a way that promotes public policy debate or benefits the party as a whole, rather than any particular candidate, and thus attenuates or eliminates any risk of "undue influence."

Section 441a(d) must be construed so as to avoid inhibiting constitutionally protected party communications that do not bear a sufficiently close relationship to the statutory purpose. It was to resolve precisely this type of overbreadth that the Court applied the "express advocacy" standard in *Buckley* with respect to independent expenditures. Application of that standard is equally necessary to save section 441a(d) from invalidity on grounds of overbreadth and vagueness.

3. Because the court of appeals applied the FEC's constitutionally impermissible construction of section 441a (d), the facial constitutionality of the section is not properly presented. In *dictum*, the court of appeals suggested

that the advertisement at issue in this case was not "express advocacy." Since that same conclusion might be reached on remand, it is not necessary for this Court to determine the facial constitutionality of section 441a(d).

ARGUMENT

I. THE FEC'S CONSTRUCTION OF 2 U.S.C. § 441a(d) IS UNCONSTITUTIONALLY VAGUE

While eschewing an "express advocacy" standard, the FEC seeks enforcement against petitioners on the basis of a test completely lacking in the specificity necessary to practically apply the Act's party spending limitations. The FEC claims, and the court of appeals concurred, that party communications are subject to the limitations of section 441a(d) if they are found (1) to have been made "in connection with the general election;" (2) to refer to a clearly identified candidate in the general election; and (3) to contain an "electioneering message." Pet. App. at 67a.

This Court has long held that "[t]he maintenance of the opportunity for free political discussion to the end that Government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Baggett v. Bullitt*, 377 U.S. 360, 372 n.10 (1964) (citations omitted). Because the right to free political expression is at the core of the First Amendment, "[a] statute which upon its face . . . is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guarantee of liberty contained in the [Fifth] Amendment." *Id.*

The Due Process Clause of the Fifth Amendment to the United States Constitution prohibits the Government from enacting statutes that forbid the "doing of an act in terms so vague that men of common intelligence must

necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). This Court has held on numerous occasions that the prohibition against unconstitutionally vague statutes and regulations has particularly strong application in the area of First Amendment speech. *See, e.g., Baggett,* 377 U.S. at 372. Thus, in *Buckley,* the Court counseled the government that it may regulate political activities "only with narrow specificity." 424 U.S. at 41 n.48.

Despite the requirements imposed by the First and Fifth Amendments, the FEC advocates a standard—"electioneering message"—that leaves political parties without any meaningful guidance by which they may distinguish activities limited by section 441a(d) from those that are beyond its scope. Under that test, "electioneering message" is defined vaguely as a message that is "designed to urge the public to elect a certain candidate or party." Pet. App. at 70a. By its own terms, this test requires a subjective determination regarding what a political party "designed" its activities to accomplish. The result is a test that leaves political parties at the mercy of *ad hoc* Government determinations regarding which messages are "electioneering" in nature.

The subjective and vague nature of this test is clearly demonstrated by the facts of this case. The FEC based its conclusion that the advertisement in question contained an "electioneering message" on highly uncertain grounds. In order to determine whether the advertisement contained an "electioneering message," the FEC examined its placement and text, as well as the alleged motives of the party in producing and running the advertisement. Pet. App. at 69a-70a. With regard to this latter examination, the FEC, without any ability to know the party's "true motives" for running the advertisement, turned, among other things, to "news accounts" to determine why the party most likely ran this particular advertisement. *Id.*

It is precisely this type of subjective, case-by-case determination that the Due Process Clause and the First Amendment were designed to prohibit. To achieve the purposes of the Act, the FEC need not turn itself into a Delphic oracle, dispensing vague advice while at the same time ensnarling the unwary in the unforeseeable consequences of its riddled pronouncements. Indeed, in *Buckley,* this Court provided the FEC with a perfectly acceptable alternative to the vague "electioneering message" standard. The "express advocacy" standard, unlike the one proposed by the FEC, avoids constitutional infirmity. *See* Section II, *infra.*

The FEC's response to the acknowledged vagaries of the "electioneering message" standard demonstrates precisely how unsatisfactory that standard is. While noting that this standard "may leave room for uncertainty at the periphery," the FEC offers political parties the opportunity to seek an FEC advisory opinion, pursuant to 2 U.S.C. § 437f, in advance of any proposed activity that *might* constitute an "electioneering message." Br. for Resp't in Opp'n at 17. However, this proposed solution merely demonstrates the problem.

The purpose of the First Amendment, and indeed its value, is that it guarantees the right to freedom of speech without having to subject that speech to prior review and approval by the Government. Statutes that limit this right "must be narrowly drawn to meet the precise evil the legislature seeks to curb . . . and . . . the conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation." *Baggett,* 377 U.S. at 372 n.10 (citations omitted).

In this instance, the FEC has proposed a standard that falls far short of this requirement. The "electioneering message" standard it has proposed would create uncertainty and apprehension among the political parties. With-

out the ability to *know* the lawfulness of their conduct, parties will be at the mercy of the government in delivering their political messages. This is precisely what the First and Fifth Amendments seek to avoid, and such a result is avoidable through the application of the clearer express advocacy standard.[1]

II. SECTION 441a(d) SHOULD BE CONSTRUED TO APPLY TO PARTY COMMUNICATIONS ONLY WHEN THEY EXPRESSLY ADVOCATE THE ELECTION OR DEFEAT OF A CLEARLY IDENTIFIED CANDIDATE

In *Buckley*, this Court found that, while contribution limitations impose only a "marginal restriction upon the contributor's ability to engage in free communication," 424 U.S. at 20-21, limits on expenditures "represent substantial . . . restraints on the quantity and diversity of political speech." *Id.* at 19. This Court found that the Government's interest in preventing the reality or appearance of corruption by the influence of campaign contributions on candidates' actions is "sufficient to justify the limited effect" of contributions on First Amendment freedoms. *Id.* at 29. The Court then proceeded to analyze FECA's limitation on independent expenditures by individuals and groups "relative to a clearly identified candidate."[2]

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[1] The court of apeals held that the FEC's interpretation of the FECA in establishing the electioneering message standard is entitled to judicial deference under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). However, such deference is not appropriate where, as here, the agency's interpretation of an act creates a "serious constitutional concern." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577 (1988); *see also Gates & Fox Co. v. Occupational Safety & Health Resources Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.) ("the due process clause prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires").

[2] Contained in former section 608(e)(1).

First, this Court found that "in order to preserve the provision against invalidation on vagueness grounds," this provision "must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44. Only then did the Court address the question of whether, "even as thus narrowly and explicitly construed," the limitation "impermissibly burdens the constitutional right of free expression." *Id.* The Court found that the "absence of prearrangement and coordination" of independent expenditures "undermines the value to the candidate," thereby "allev[iating] the danger" of corruption. *Id.* at 47. Therefore, the Government interest in preventing corruption does not justify the more substantial restraint on free expression imposed by limits on independent expenditures. *Id.*

In the instant case, the court of appeals reasoned that such a narrow construction is not required with respect to section 441a(d), because *Buckley* was interpreting a limit on independent expenditures, while section 441a(d) addresses "coordinated expenditures" that are to be treated as mere "contributions." Pet. App. at 12a-13a. The court assumed that, because parties are deemed incapable of making "independent" expenditures under the FEC's rules, *all* party expenditures are to be "treat[ed] . . . as contributions." *Id.* at 13a. Then, proceeding on the same assumption—*i.e.* "[v]iewing the party expenditures *as contributions*, as we must,"—the court found the FEC's broad construction of the statute to be reasonable, on the ground that, as mere "contributions," party expenditures implicate the statutory "concern that large contributors to political parties will exert undue influence on a candidate if elected to office." *Id.* at 16a (emphasis added).

Political parties engage in a wide range of communications. Party spending for some of these communications is akin to a contribution for purposes of the *Buckley* analysis. However, many party communications represent the

party's own political expression and are clearly entitled to the higher degree of constitutional protection *Buckley* afforded to expenditures. Further, many party communications simply promote the party or its ideas, positions or message broadly, rendering any link to specific candidates too diffuse to present even the perceived threat of undue influence. Therefore, section 441a(d) must be narrowly construed to avoid impinging on those party expressions that are entitled to a high degree of First Amendment protection but which do not fall into the area of speech intended to be regulated.

This Court supplied a properly narrow construction in *Buckley*, through application of the "express advocacy" standard. 424 U.S. at 44. This narrowing construction, intended to distinguish between issue discussion and electoral advocacy, is equally effective in distinguishing between party communications that are sufficiently linked to a particular candidate to be treated as mere contributions to the candidate, and expresions that more broadly promote the party, its themes, ideas or positions, and therefore are protected expenditures that do not implicate the statutory purpose.

A. Many Party Communications Should Be Entitled to the High Degree of Constitutional Protection Accorded to Expenditures

Political parties expend their funds on a wide array of communications. These range from communications that can clearly be considered, for purposes of this Court's analysis in *Buckley*, to be akin to contributions to those which, under that analysis, should be accorded the same high degree of protection as expenditures. At one end of the continuum, political parties may pay for communications that are contracted for or directly requested by a specific candidate, and unambiguously call for the election of that candidate to a particular office. These expenditures are clearly like contributions, in that they do not implicate the party's own expression, and thus "do not in any way

infringe the [party's] freedom to discuss candidates and issues;" rather, they "involve[] speech by someone other than the contributor." *Buckley*, 424 U.S. at 21. This sort of party spending is properly regarded as a kind of " 'speech by proxy' that . . . is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection." *California Medical Ass'n v. FEC*, 453 U.S. 182, 196 (1981).

At the other end of the continuum lies a variety of communications that formulate and promote the party's ideas, programs and themes. Parties develop policy ideas and positions, not only in the adoption of their formal platforms, but on an ongoing basis. Both the DNC and the Republican National Committee ("RNC"), for example, have sponsored a number of policy councils and other policy development projects. *Cf.* David E. Price, *Bringing Back the Parties* 263-79 (1984). Parties are also involved in promoting their policies and positions by urging support for, or opposition to, legislation. The RNC, for example, recently requested guidance from the FEC with respect to a planned program of advertising concerning legislative proposals such as the balanced budget debate and welfare reform that are being considered by the Congress. FEC Advisory Opinion 1995-25, Fed. Election Camp. Fin. Guide (CCH) ¶ 6162 (1995). The DNC and some Democratic state parties have recently run advertisements on the balanced budget debate, and the DNC has in the past undertaken other advertising campaigns to promote legislative proposals or positions. *See generally* Herbert E. Alexander & Anthony Corrado, *Financing the 1992 Election* 295-96 (1995). Similarly, both Democratic and Republican committees publish bulletins, brochures and other communications that promote their respective parties' positions on legislative and other public policy issues (e.g., the DNC's "Daily Briefing" and the RNC's weekly "Monday Briefing"). In the same vein, the RNC sponsors a television program, "Rising Tide," in which party officials and leaders discuss such issues and promote

Republican views and positions. *See* Stephen Seplow, *GOP-TV: Plugged in to party line*, Philadelphia Inquirer, Oct. 31 1995 at A1.

These activities cannot be categorized or distinguished on the basis of whether they contain a reference to a "clearly identified" candidate. Often these party communications on issues refer to the positions or views of legislative leaders who may be candidates for re-election. For example, party discussions of legislative and policy issues may criticize the leaders of the opposing party for their views on, or actions with respect to, such issues. It is not unusual, for example, for Republican party materials to criticize the positions taken by the President on legislative issues and for Democratic party materials to criticize similarly the positions of Republican leaders in the Congress.

Other important party activities include efforts to persuade the public to support the party as a whole, without reference to a particular candidate. Such efforts include voter registration, programs to identify party supporters, leafleting, phoning and other activities aimed at turning out supporters on election day. Some communications may urge the public to "vote Republican" or "vote Democratic" without mentioning a specific candidate. The FEC's regulations recognize this category of activity as "generic voter drives," which are defined to include—

> voter registration, voter identification and get-out-the-vote drives, or any other activities that urge the public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate.

11 C.F.R. § 106.5(a)(2)(iv).

This entire range of communications is clearly entitled to the same degree of protection that the Court in *Buckley* accorded to expenditures, because limiting the amount parties can spend for such communications would "impose substantial restraints on the quantity of political speech."

424 U.S. at 39. In formulating and promoting policy positions, and supporting or opposing legislation, the parties are engaged in expressions "at the core of the First Amendment." *FEC v. National Conservative Political Action Comm.* ("*NCPAC*"), 470 U.S. 480, 493 (1985). This is all the more significant because "a major purpose of the Amendment was to protect the free discussion of governmental affairs. . . ." *Buckley*, 424 U.S. at 14 (citations omitted). Further, such expressions as well as "generic" communications promoting party themes cannot be considered mere "proxy speech." *California Medical Ass'n*, 453 U.S. at 196. Rather, they are expressions by the party itself, reflecting the party's collective judgment about what to say and when and how to say it. In this sense they do "communicate the underlying basis for the support" of the party and its candidates and thus directly implicate the party's "freedom to discuss candidates and issues." *Buckley*, 424 U.S. at 21.

Finally, these communications also directly implicate the parties' associational rights. "[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by . . . freedom of speech." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). This "freedom of association protected by the First . . . Amendment[] includes partisan political organization." *Tashjian v. Republican Party*, 479 U.S. 208, 214 (1986). In addressing legislative and policy issues, and promoting the party and its themes and principles, the parties function as "organizations which serve to 'amplif[y] the voice of their adherents.'" *NCPAC*, 470 U.S. at 494 (citing *Buckley*, 424 U.S. at 22).

Thus, while some party communications can logically be treated as contributions, many others must be considered akin to expenditures, entitled to the same high degree of constitutional protection as the expenditures of individuals and groups considered in *Buckley*.

B. Many Party Communications Do Not Implicate the Purpose of the Statute Notwithstanding Some Degree of Coordination with Candidates

The court of appeals did not consider whether section 441a(d) might impermissibly reach constitutionally protected communications that do not implicate the purpose of the statute. Instead, the court simply assumed—without analyzing the issue—that all party communications automatically bear a sufficiently close relationship to the purpose behind the statute. The court reasoned that since parties are deemed incapable of making independent expenditures under the FEC's rules, 11 C.F.R. § 110.7 (a)(5), *all* of their expenditures should be considered "coordinated" expenditures subject to section 441a(d). Pet. App. 13a. Similarly the FEC argues that, "because of a party committee's close relationship with the party's candidates, all expenditures by such a committee must be considered coordinated" and therefore treated as contributions. Br. for the Resp't in Opp'n at 9. The court and the FEC err.

"[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *NCPAC*, 470 U.S. at 496-97. As the court of appeals correctly recognized, section 441a(d) "addresses the concern that large contributors to political parties exert undue influence on a candidate if elected to office." Pet. App. at 16a; *see also FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 41 (1981). In *Buckley*, this Court held that "[t]he absence of prearrangement and coordination . . . with a candidate," 424 U.S. at 47, in an independent expenditure alleviates the danger of corruption.

To be sure, it is reasonable to assume, as do the FEC's regulations, that parties cannot make "independent" expenditures in the same way as other kinds of organizations. That is self-evident from the fact that parties

have a unique need to communicate and coordinate with their candidates. Such communications are with candidates not only in their capacities as persons seeking election to office, but also in their roles as party officials, leaders and spokespersons. Sponsoring a television show promoting the party's position on issues, for example, may naturally feature party leaders who are officeholders—and candidates—as spokespersons for the party. Brochures, leaflets and other materials promoting the party's platform or positions on legislative or policy issues may require obtaining information and views from legislators who may also be candidates. "Generic voter drive" activity may appropriately involve consultation with party leaders, who are officeholders and/or candidates, about which constituencies should be given priority in voter registration efforts, or what themes should be featured in materials or advertising urging the public to "vote Democrat" or "vote Republican."[8]

Parties have not only an inherent need, but also a unique associational right, to communicate and coordinate with their candidates. Limiting the ability of parties to communicate with their own leaders, including candidates, burdens the right of the party to "identify the people who constitute the association." *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). If the right of a party to select its "standardbearers," free from interference by the state, is a protected form of freedom of association, *see Eu v. San Francisco County Democratic Central Comm.*, 489

[8] Indeed, all of a party's activities may necessarily be coordinated with a candidate where officeholders who are or may be candidates actually serve as party officials, with broad responsibility for determining the party's priorities, message and programs. For example, the chairs of the congressional and senatorial campaign committees, Republican and Democrat, are Members of the House of Representatives and Senate, respectively, and national party committees may be led by officeholders as well. Senator Christopher J. Dodd currently serves as general chairman of the DNC and then-Senator Paul Laxalt formerly served as general chairman of the RNC.

U.S. 214, 224 (1989), parties must be free to work with and communicate with those candidates.

It does not follow, from the parties' unique need and right to coordinate with candidates, that all party communications implicate the statutory purpose of preventing contributors from exerting undue influence. Party communications promoting positions on legislation and issues, as well as generic communications urging support for the party and promoting its principles and themes, may as noted above, be coordinated with one or more candidates and may refer to or use as spokespersons the party's own leaders or criticize opposition figures (thereby referring to a "clearly identified" candidate). Yet such expressions inherently benefit the party as a whole; their benefit is not limited to any one particular candidate. The supposed threat of "undue influence" over a candidate effectively disappears, because the potential link between any one contribution to the party and the benefit to any one candidate becomes attenuated or dissolves altogether. These kinds of communications, therefore—while entitled to the highest degree of constitutional protection—do not trigger the congressional concern underlying section 441a(d).

C. Limiting the Scope of Section 441a(d) to Express Advocacy Is Necessary to Avoid Invalidation As Unconstitutionally Vague

Party committees cannot, under the First Amendment, be required to guess at what point along the broad continuum the limits of section 441a(d) will apply. "[S]tandards of permissible statutory vagueness are strict in the area of free expression." *NAACP v. Button*, 371 U.S. 415, 432 (1963). "Where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to ' "steer far wider of the unlawful zone" than if the boundaries of the forbidden areas were clearly marked.' " *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (notes and

citations omitted). In this case, unless section 441a(d) is narrowly construed, party committees will be forced to steer wide even of those activities that are constitutionally protected and do not fall within the area sought to be regulated.

This problem of vagueness is precisely the one addressed by this Court in the first stage of its analysis of expenditure limits on groups and individuals in *Buckley*. The Court held that such a limitation "must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44. In adopting that construction, the Court was concerned that the limitation might otherwise inhibit discussions of issues and candidates that are constitutionally protected but do not fall squarely into the area of congressional concern:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially, incumbents, are intimately tied to public issues involving legislative proposals and governmental actions.

Id. at 42. The Court thus sought to "distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986).

To be sure, the situation of political parties is different from that of other groups since all of a party's activities are, in a sense, political in nature. In *Buckley*, this Court found that it was not necessary to apply FECA's disclosure requirements only to party committee expenditures "expressly advocating" election or defeat of a candidate, since all party expenditures were intended to be subject to disclosure—and could, therefore, "be assumed to fall within the core area sought to be addressed by Congress: They are, by definition, campaign related." 424 U.S. at 79.

But disclosure requirements present a far less significant burden on parties than do limits on expenditures. "Unlike the overall limitations on contributions and expenditures, the disclosure requirements impose no ceiling on campaign-related activities." *Id.* at 64. While all party expenditures are subject to disclosure under the FECA and the FEC's rules, this Court has never suggested that section 441a(d) could be applied to limit *all* party communications.

To the extent that party communications involving substantial First Amendment rights do not implicate the relevant statutory purpose, they are indeed equivalent, as a matter of constitutional analysis, to "independent" expenditures by other kinds of organizations. Accordingly, to avoid the same problem of vagueness and overbreadth as the Court found to be presented by the individual and group expenditure limit in *Buckley*, section 441a(d) must be construed to apply only to those party communications that "expressly advocate" the election or defeat of a clearly identified candidate. *Id.* at 44. Just as the "express advocacy" standard was found necessary to ensure that the limit on individual and group spending would not inhibit issue discussion by such individuals and groups, so too would that standard serve to ensure that the limit on party spending does not, in the first instance, infringe on those analogous areas of party expression that are subject to a high degree of constitutional protection and do not fall into the "core area sought to be addressed by Congress." *Id.* at 79.

The "express advocacy" standard effectively limits the application of section 441a(d) to those instances where party spending is directly and "unambiguously related to the campaign of a particular federal candidate." *Id.* at 80. It would encompass those instances of party "proxy speech," *i.e.*, merely providing funds as a candidate directs unambiguously to promote that candidate's election to office, that can legitimately be treated for constitutional

purposes as mere contributions to the candidate. At the same time, it would eliminate the risk that parties would be inhibited from engaging in those activities which represent their own, protected expression—discussion of issues, policies, legislation, promoting the party as a whole—and in which the governmental interest in avoiding "undue influence" over any particular candidate is highly attenuated or non-existent because the benefit of the activity is widespread and diffuse, and not sufficiently linked to any particular candidate.

Section 441a(d) clearly cannot be constitutionally applied to *all* party communications. As a threshold matter, to avoid invalidation on grounds of overbreadth and vagueness, its scope should be limited to those party communications that "expressly advocate" the election or defeat of a clearly identified candidate.

III. THE COURT SHOULD NOT DECIDE WHETHER SECTION 441a(d) LIMITS ARE CONSTITUTIONAL BECAUSE THE CASE CAN BE RESOLVED WITHOUT DOING SO

This Court should reverse the decision of the court of appeals for the reasons discussed *supra; i.e.*, because the FEC and the court of appeals applied an unconstitutionally vague and improper legal standard to petitioners' coordinated expenditures in this case. However, in so doing, this Court need not rule on the facial constitutionality of the coordinated expenditure limits contained in section 441a(d). It is well-settled that a court should not "decide constitutional challenges in cases where the resolution of the unsettled questions of statutory interpretation may remove the need for constitutional adjudication." *California Medical Ass'n*, 453 U.S. at 193 n.14 (1981); *accord Thorpe v. Housing Auth.*, 393 U.S. 268, 284 (1969). Similarly, this Court has stated "it is wiser to delay passing upon the constitutionality of . . . [a] statute until faced with cases involving particular provi-

sions as specifically applied to persons who claim to be injured." *Nixon v. Administrator of General Services*, 433 U.S. 425, 438 (1977) (citations omitted).

In this case, the court of appeals applied the "electioneering message" test in holding that petitioners' expenditures had to be counted against the section 441a(d) limit. The court of appeals offered no similarly detailed analysis of how the expenditure would be treated under the "express advocacy" test proposed by *amici* and adopted by the district court. Indeed, in the only passage of its opinion addressing this question, the court of appeals indicated in *dictum* that the expenditure "would not constitute express advocacy." Pet. App. at 17a n.10.

The application of the "express advocacy" test to the facts of this case is, of course, not before this Court. If this Court instructs the court of appeals to review this case more fully in light of the "express advocacy" test, it is uncertain whether the court of appeals would find that the expenditures in question meet the "express advocacy" test. Therefore, there is no need for the Court to reach petitioners' claim of facial unconstitutionality in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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